

No. 14,566

IN THE

United States Court of Appeals
For the Ninth Circuit

ELMER W. BROWN,

Appellant,

VS.

ALASKA INDUSTRIAL BOARD, ALASKA AG-
GREGATE CORPORATION and MORRELL P.

TOTTEN & COMPANY, INC.,

Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF FOR APPELLANT.

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OPINION BELOW.

The District Court did not render an opinion in this case.

JURISDICTION.

This is an appeal from an award of the Alaska Industrial Board brought to the District Court under the provisions of §43-3-22 ACLA 1949. (R. 7.) On July 19, 1954, the District Court, without opinion, entered its decree affirming the award of the Board.

(R. 7, 13.) An appeal from such decree was taken on August 12, 1954, by filing with the District Court notice of appeal. (R. 14.) The jurisdiction of the District Court rests on the Act of June 6, 1900, 31 Stat. 322, as amended, 48 USCA §101; the jurisdiction of this Court on §1291 of the Federal Judicial Code.

STATEMENT.

Appellant adopts as his statement of the case, the Agreed Statement set out in the Record at pages 3-7.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set out in the Appendix, *infra*.

QUESTIONS PRESENTED.

1. Whether the Alaska Industrial Board, in determining appellant's average daily wage earning capacity, made findings of fact in compliance with the provisions of §43-3-16 ACLA 1949.

2. Whether the facts in this case justify the determination by the Alaska Industrial Board and by the District Court that during the period of appellant's disability his average daily wage earning capacity, within the meaning of the "Temporary Disability" section of §43-3-1 ACLA 1949 was \$13.07 per day.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In not making sufficient findings of fact, in compliance with the provisions of §43-3-16 ACLA 1949, to support its determination that appellant's average daily wage earning capacity during the period of his disability was \$13.07 per day.

2. In holding that there was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining that plaintiff's average daily wage during the period of his disability was \$13.07 per day.

3. In entering its decree in favor of the appellees and in affirming the decision and award of January 8, 1954, of the Alaska Industrial Board, and in giving judgment to appellees against appellant for the former's costs and attorney's fees.

ARGUMENT.

PRELIMINARY CONSIDERATIONS.

These facts are not in dispute: That appellant was injured by accident in the course of his employment with appellee, Alaska Aggregate Corporation (R. 3-4); that at the time of such injury, September 15, 1952, his average weekly "take-home" pay was \$319.00, or approximately \$45.57 per day (R. 3); that by reason of such injury appellant suffered a "temporary disability" within the meaning of the "temporary disability" provision of §43-3-1 ACLA 1949,

for the period November 24, 1952, to February 16, 1953 (R. 4); and that he was entitled to temporary disability compensation during that period by virtue of that provision of the statute. What is in dispute is the amount of compensation to which appellant was entitled, and the answer to this depends upon the proper construction, and application in this case, of that part of the statute above mentioned. Such section on temporary disability reads as follows:

“[Temporary disability.] For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

“Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

“The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the In-

dustrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.”

Prior to the Alaska Industrial Board’s award of January 8, 1954, appellees had paid appellant temporary disability compensation at the rate of 65% of \$17.20, or, \$11.18 per day. This constituted appellees’ determination of appellant’s “average daily wage earning capacity”, and presumably, this determination was based upon the facts, as they appear in the Record, that appellant was a resident of the State of Washington and customarily resided there, and not in Alaska; that his usual occupation was that of a “cat-skinner”; and that the “going” rate for cat-skinners during the period of disability, November 24, 1952, to February 16, 1953, averaged \$17.20 per day. (R. 4.)

The Industrial Board, similarly, ignored appellant’s actual earnings at the time of the injury, and without indicating in any manner whether it had any “regard for the nature of his injury, the degree of temporary impairment, etc.” (§43-3-1 [Temporary Disability] ACLA 1949), or upon what facts it based its determination, the Board simply stated: “Applicant’s earning capacity is hereby determined to be \$13.07 per day.” (R. 9.) Perhaps the Board knows how it arrived at this figure; certainly, no one else can determine this.

It is appellant's position (1) that both parties are wrong—appellees, in computing an average earning capacity of \$17.20 per day, and the Industrial Board, in arriving at its figure of \$13.07 per day; and (2) that appellant's actual earnings at the time of his injury fairly and reasonably represented his daily wage earning capacity, and if not that, then based upon his actual earnings for the year of injury, his average earning capacity was certainly considerably more than \$17.20 per day.

I. IT WAS REVERSIBLE ERROR TO HAVE NOT MADE FINDINGS OF FACT IN COMPLIANCE WITH THE PROVISIONS OF §43-3-16 ACLA 1949.

Although the Board did not say so, it presumably can be implied from its finding that appellant's wage earning capacity was \$13.07 per day (R. 9), the initial determination that appellant's actual earnings, at the time of his injury, did not "fairly and reasonably represent his daily wage earning capacity". §43-3-1 "Temporary Disability". This being the case, it was then the duty of the Board to fix such earning capacity after having "due regard" to each of the following:

1. The nature of the injury.
2. The degree of temporary impairment.
3. Appellant's usual employment.
4. Any other factor or circumstance in the case which may have affected his capacity to earn wages in his temporarily disabled condition.

It is impossible to tell from the record in this case, because of the simple conclusion that appellant's earning capacity was \$13.07 per day (R. 9), what the above factors had to do with this determination of earning capacity. In fact, the Board's findings were so lacking in particularity, that it is safe to assume that no regard at all was had to those items specified in the statute.

What, then, the Board has done is to make an award of \$13.07 per day for a certain period, but it has failed to accompany this with the "findings of fact upon which it is based * * *", §43-3-16 ACLA 1949. Such findings, it would seem, should be obligatory. If the law were otherwise, there would be nothing to prevent a Board, in respect to temporary compensation awards, from making an arbitrary choice of some figure supposedly representing one's average wage earning capacity—a figure which would bear no logical relation to the injured person's actual earning capacity during the period of his disability, his "usual earnings", the nature of his injury, or the degree of temporary impairment—and base an award on that figure. The whole purpose and intent of the Workmen's Compensation Law—to fairly compensate one for loss of earnings during the period of his disability—would thus be frustrated, and sanction of the Board's action in this respect would be given by the Courts if the latter would hold, upon review of the Board's decision on any such case, that it thus sufficiently complied with the provisions of law requiring findings of fact upon which an award is based.

That is precisely the case here. There is no conceivable way to determine from the Board's decision and award of January 8, 1954, what relation, if any, the figure of \$13.07 per day bears to appellant's usual earnings, the nature of his injury, or the degree of his temporary impairment. The failure of the Board, and the District Court, to indicate in any degree the basis for the award made and the determination that appellant's earning capacity was \$13.07 per day, constitutes a failure to comply with the provisions of §43-3-16 ACLA 1949, and has made it impossible for this reviewing Court to determine whether there was any substantial evidence in the Record which would support this determination. This, it is submitted, was error, and sufficient reason for reversing the decision of the District Court. See *DeVore v. Maidt Plastering Co.*, 205 Okla. 610, 239 P. 2d 520; *Fireman's Fund Ins. Co. v. Peterson*, CA-9, 120 F. 2d 547, 548; *Howard v. Monahan*, 33 F. 2d 220.

II. THE EVIDENCE DOES NOT SUPPORT THE BOARD'S DETERMINATION, AFFIRMED BY THE DISTRICT COURT, OF APPELLANT'S AVERAGE DAILY WAGE EARNING CAPACITY.

Even if it could be held that the Board's decision that appellant's daily average wage earning capacity was \$13.07 was a "finding" in sufficient compliance with §43-3-16 ACLA 1949 (which appellant does not admit), still, there is no substantial evidence in the Record to support this determination. Rather, the evidence clearly supports the fact that appellant's

earning capacity was considerably more than the amount determined by the Board and the District Court.

The Alaska statute on this subject, §43-3-1 "Temporary Disability", measures one's earning capacity under two situations: (1) by his actual earnings at the time of injury, "... if such actual earnings fairly and reasonably represent his daily wage earning capacity", and (2) if such earnings do not fairly represent such capacity, then by what does constitute "reasonable" wage earning capacity, "having due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition."

The law, however, is silent on the subject of exactly when one's actual earnings do represent his average earning capacity, and when not, and, if not, what they amount to; in other words, there is an absence of any precise formula by which those determinations can be made. In such a situation it is necessary to consider the real objective of wage calculation, which is to arrive at a fair approximation of the injured employee's future earning capacity, and not to be influenced by the thought that a compensation theory is necessarily satisfied when a mechanical representation of the claimant's earnings in some arbitrary past period is used as a wage basis. It must be remembered at all times that an injured workman's disability reaches into the future, and not the past, and

that his loss as a result of such disability has an impact only on probable future earnings. See Larson, *Workmen's Compensation Law*, Vol. 2, page 71, §60.11; *St. Paul-Mercury Indemnity Co. v. Idov*, 88 Ga. 697, 77 SE 2d 327, 329.

With this in mind, it would be reasonable then to give this construction to the statute:

1. Actual earnings at the time of injury should be used as the basis for temporary compensation, where the type of employment engaged in by the workman at the time of injury is of a regular, permanent and steady character.

2. Where the employment is discontinuous or irregular, actual earnings cannot be used; in such case, the average wage earning capacity would have to be determined with consideration given to a history of the employee's earnings in other employment, together with his "capacity", that is, his fitness, willingness and readiness to work, considered in connection with opportunity to work.

Thus, giving proper consideration to the realities of temporary total disability, and the objectives of the law on this subject, it would be perfectly proper and logical to so interpret the temporary disability section of the Alaska statute, and under such construction, that is, under either "(1)" or "(2)", *supra*, the evidence in this case clearly shows that the Board's figure of \$13.07 per day, as appellant's average daily wage earning capacity, was far below that amount which, in reality, would represent his loss of earnings during his period of disability.

1. *Actual Earnings.*

It is appellant's principal contention that he ought to have had temporary disability compensation based upon his earnings at the time of his injury, that is, either on an average figure of \$319.00 per week, or \$45.57 per day (R. 3), or, in the event that the overtime that he had been putting in could not fairly be considered as "average", then at least at his hourly rate of \$3.65 an hour for an eight-hour day, or \$29.20 per day. (R. 3.) It is true that the evidence shows, for the year of appellant's injury, a record of employment from the beginning of the year to September 1 which could be termed intermittent or discontinuous. (R. 5-6.) But it is noteworthy that although appellant had worked for six different employers in that eight-month period, his longest period of continuous, uninterrupted employment for that year was with appellee, Alaska Aggregate Corporation—from September 1, 1952, until November 24, 1952—and that here his earnings were the largest. (R. 6.) Moreover, although evidence was introduced showing that appellant was still domiciled in the State of Washington, that his regular employment there was that of a cat-skinner, and that if he had been employed in the State of Washington as a cat-skinner during the period of his disability, he would have earned \$17.27 per day, there was also in the record much more important evidence. And this consists of the fact that when appellant suffered the injury which gave rise to his disability, he had achieved something higher in the ranks of the wage-earner in the construction trade, that is, that of a foreman in charge of

heavy equipment, and had thus graduated or had been promoted from the category of "cat-skinner" to a position of considerably greater achievement. In addition, there was no evidence at all indicating that he severed his employment with appellee, Alaska Aggregate Corporation, for any reason other than that of his injury, and that except for the injury, such employment would not have continued as full time work. Thus, there is every reason to presume that once having attained this good, full time employment, superior to anything he had had in the past, appellant would have maintained himself at that level in the future. The inherent quality, then, of appellant's work with Alaska Aggregate Corporation, was continuous, permanent and steady; and being so, compensation based upon the earnings of that employment, rather than those which preceded it, would fairly compensate appellant for the loss of earning capacity which was sustained. This, it is submitted, is what the Alaska statute contemplates; the interpretation and conclusion that leads to consequences that are just. Cf. *St. Paul-Mercury Indemnity Co. v. Idov*, 88 Ga. 697, 77 SE 2d 327, 329; *O'Hearne v. Md. Casualty Co.*, CA-4, 177 F. 2d 979.

2. Assuming, *arguendo*, that appellant's actual earnings do not represent his average earning capacity, it is clear from an application of the second test mentioned above to these facts that such earning capacity logically must be considerably more than that found by the Board. Previous employment history now is of some significance, and in such respects, the record shows these facts:

(a) At the time, subsequent to his injury, that appellant left the employment of appellee, Alaska Aggregate Corporation, on November 24, 1952, he had been, with the exception of possibly a few days in February and August, steadily employed all of that year.

(b) In such steady and continuous employment (including that with Alaska Aggregate), his total gross earnings were \$10,005.81.

(c) The period January 1, 1952, to November 15, 1952, constitutes 320 days, and thus, appellant's average daily wage for such period was \$31.26.

(d) Assuming that such "average" must be computed for the entire year, or 366 days, then his average daily wage was \$27.06. (R. 5-6.)

What better evidence is there that, under that construction of the Alaska statute which would not justify actual earnings at the time of injury to be used as the sole measure, appellant's earning capacity must have been, during the period of his disability, considerably more than the \$13.07 per day which the Board allowed (R. 9), and even more than that acknowledged by appellees, or \$17.20 per day (R. 6)? As pointed out in the first part of this brief, it is impossible to ascertain from these facts how the Board's computation was made, or how it is justified; and appellees' theory of \$17.20 is illogical and contrary to the evidence, for there is no relation whatever between this nine and one-half months of continuous employment during which an average of \$31.26 a day

was earned, and appellees' purely hypothetical situation that if appellant had not been injured, and if he had been working in Seattle during the period of his disability, and if he had been employed there as a cat-skinner, and if such employment had been on the basis of a forty-hour week—that he would then have averaged \$17.20 per day.

The Record speaks for itself, and the facts there, and not appellees' hypotheses, show "capacity", that is, appellant's fitness, readiness and willingness to work, considered in connection with his opportunities to work, and that "capacity" is the key word, the test of what appellant has lost in earnings by reason of his injury. Cf. *Mahoney Co. v. Marshall*, 46 F. 2d 539, affirmed in 56 F. 2d 74. (CA-9.)

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed.

Dated, Juneau, Alaska,
February 23, 1955.

JOHN H. DIMOND,
ROY E. JACKSON,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

§43-3-1 [*Temporary Disability.*] ACLA 1949

“For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

“Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

“The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.”

§43-3-16 ACLA 1949

“Review by full Board: Application: Time for: Award: Filing: Copies. If an application for review is made to the Industrial Board within ten days from the date of an award, made by less than all the members, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith.”